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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Closed Captioning and Video Description of Video Programming	)	
	)	MM Docket No. 95-176
Implementation of Section 305 of the Telecommunications Act of 1996	)	
	)	
Video Programming Accessibility	)	

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

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COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, hereby submits its Comments in the above-captioned proceeding.[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include cable television operators serving over 80 percent of the cable television households in the nation, and over 100 national and regional program networks.

INTRODUCTION

NCTA participated in the Commission's Notice of Inquiry that preceded this rulemaking proceeding. There, NCTA explained that the cable industry is committed to serving the important goal of captioning its program services. To that end, well before passage of the Telecommunications Act of 1996, the cable programming community has engaged in significant efforts to offer subscribers an ever-increasing array of captioned programming. NCTA's

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1 These Comments also represent the views of the Cable Telecommunications Association ("CATA").

comments also detailed the diverse nature of the cable television industry, the unique formats presented by many networks and the particular challenges faced by the industry in captioning the vast amount of programming presented daily to viewers around the country. NCTA also estimated that the costs of captioning the hundreds of thousands of hours of basic cable programming alone could range from $500 to $900 million per year on top of the significant amount already expended by the cable industry.

Congress was aware that captioning costs could adversely impact the variety, quality and quantity of programming provided to the public. Through a combination of reasonable timetables for implementing the rules, appropriate exemptions from the rules for particular categories of programming, and rational compliance obligations, the Commission can achieve Congress' balanced goals.

NCTA's proposes the following:

- that the Commission allow a ten year transition for new, non-exempt programming, and not require captioning of every new non-exempt program at the end of the transition;

- that the rules measure compliance with the phase-in requirements on a network-by-network basis, rather than across a cable system's entire line-up, and that compliance is measured on an annual basis;

- that the FCC exempt certain categories of new programming from any captioning requirements, such as start-up networks; programming aired during the overnight daypart; interstitial/promotional programming; local origination programming; PEG programming; and commercials; and that, with respect to library programming, the FCC not adopt percentage phase-ins at this time.

- Our Comments also agree with the Notice that quality standards should not be adopted at this time. We also propose that the Commission implement the rules in a manner that minimizes administrative burdens.

ARGUMENT

I. CONGRESS RECOGNIZED THAT THE GOALS OF ACCESSIBILITY OF VIDEO PROGRAMMING THROUGH CAPTIONING MUST BE IMPLEMENTED IN A MANNER THAT AVOIDS IMPOSING ECONOMIC HARDSHIP ON PROGRAM NETWORKS

Section 713 of the 1996 Telecommunications Act requires the FCC to adopt regulations to ensure that "video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions ...."[2] That provision also directs the Commission to prescribe such regulations as are necessary to ensure that "video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date of such regulations through the provision of closed captions..."[3] These provisions clearly reflect Congress' view that regulations should differentiate between new programming and previously published programming.

The captioning provisions are subject to three exceptions contained in subsection (d). First, "the Commission may exempt by regulation programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be

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2 47 U.S.C. §612(b)(1).

3 Id., §612(b)(2).

economically burdensome to the provider or owner of such programming."[4] Second, a provider or owner of video programming is not required to caption if such action "would be inconsistent with contracts" in effect on the date of enactment -- February 8, 1996.[5] Third, a provider or owner may petition the FCC for an exemption from the captioning requirements where they would result in an "undue burden."[6]

Congress directed the Commission, prior to adopting regulations, to examine the existing levels of captioning and the costs that captioning would impose. To that end, the Commission issued a Notice of Inquiry in 1996.[7] NCTA's Comments on the Notice of Inquiry detailed the degree to which, even in the absence of captioning mandates, cable customers today have access to a wide and ever-increasing array of captioned programming. As cable networks have grown, reaching more subscribers and gaining more viewership, additional efforts have been made to caption an expanding amount of cable programming. The overall percentage of captioned programming (for the top 20 basic cable and the most widely distributed 6 premium networks) is nearly 24 percent.[8] For individual premium services, the percentage of captioned programming

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4 Id., Subsection (d)(1).

5 Id., Subsection (d)(2). A video programming provider is not relieved under this provision from its obligations to provide services required by Federal law. The legislative history explains that this was intended to ensure that cable operators did not refuse to carry programming or services required to be carried under Title VI or pursuant to retransmission consent due to captioning obligations. H. Rep. No. 104-204, 104th Cong., 1st Sess. 115 (hereinafter "House Report").

6 Id., Subsection (d)(3).

7 Closed Captioning and Video Description of Video Programming, Notice of Inquiry, 11 FCC Rcd. 4912 (1996)(hereinafter "Notice of Inquiry").

8 NCTA Comments, MM Docket No. 95-176 (filed Mar. 15, 1996) at 4.

reaches as high as 80 percent.[9] In addition, cable subscribers have access to broadcast stations that are themselves captioned, and cable operators retransmit to their customers all material that the local broadcast stations transmit in a captioned format.

The data provided in response to the Inquiry makes clear that captioning the remainder of cable programming that is not currently captioned will take significant efforts and will be extremely costly. Captioning costs, if imposed abruptly on the cable industry, would pose a significant economic burden.

II. CAPTIONING ALL PROGRAMMING THAT IS CURRENTLY NOT CAPTIONED WOULD BE ECONOMICALLY BURDENSOME

The Commission's Report to Congress reveals that captioning a 24 hour-a-day service can be quite expensive. The Report explains that there are several different methods of captioning:[10] (1) off-line captioning, used for pre-recorded programs, the costs for which range from $800 to $2,500 an hour. (Encoding captions onto the program tape adds approximately $200 for a half-hour program to $650 for a two-hour program);[11] (2) live encoded captioning, also created off-line for pre-recorded programming, but not encoded in the program tape;[12] (3) automatic live-encoded captioning, in which captions are encoded after the original airing; (4) real time captioning of live programming, which employs stenocaptioners who transcribe the audio portion of a live program as it airs, with costs ranging between $300 and $1200 per hour;[13]

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9 Id.

10 Report, MM Docket No. 95-176 (rel. July 29, 1996) at ¶42 (hereinafter "Captioning Report").

11 Captioning Report, at ¶47.

12 Id. at ¶43.

13 Id. at ¶48.

and (5) electronic newsroom ("ENR") captioning, which requires equipment generally costing between $2,500 and $10,000.[14] Developing the ability to caption in-house is also costly, necessitating the purchase of equipment (between $50,000 and $75,000), and the hiring and training of staff.[15]

The cost of captioning for any particular network obviously will vary based on the type of programming that makes up the majority of its schedule. Some networks emphasize live programming that may be unscripted, and for which the only feasible option would be real time captioning. Others provide primarily pre-recorded programs, for which off-line captioning would be necessary. Yet others show primarily classic movies and series that were not captioned at the time they were originally produced.

NCTA's Comments in the NOI estimated that captioning all basic cable programming alone could cost anywhere from $500 million to $900 million per year on top of the significant amount already expended by the cable industry.[16] This amount represents up to one-third of the basic cable programmers' 1995 total annual programming expenditures. It translates into $7.71 to $13.88 per subscriber per year in captioning costs.

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14 Id. at ¶45.

15 Id. at ¶50.

16 See NCTA Comments, MM Docket No. 95-176 (filed Mar. 15, 1996) at 15. These cost estimates were derived from multiplying the 621,231 hours of basic cable programming that currently is not captioned by $750 - $1500 (the cost of captioning an hour of new programming). The cost of captioning just prime time programming on all national basic cable networks is estimated to be in the range of $58 million to $116 million annually. (Includes 85 national cable networks that have prime time programming and that are not foreign language networks.)

Moreover, basic cable networks face significant ongoing captioning costs. Each year, in addition to incurring the cost of captioning original productions, cable networks must pay to caption previously exhibited programming even if it was captioned previously.

It is critical for the Commission to understand, and to take into consideration, the way programming is captioned -- and recaptioned -- at every stage of its distribution. For example, even a movie or a series that was previously captioned (such as during its over-the-air broadcast network run) may need to be reformatted to air the program on basic cable.[17] This reformatting is required, for example, when a program is edited to fit a different time period from its original one, or to insert commercial breaks.

Changes made during the editing process affect the synchronization of the captions, and therefore require the captions to be resynchronized with the video portion of the program. Reformatting can be particularly difficult where there is a significant amount of dialogue in the program, leaving less room to edit around the captions. Therefore, every time a program (movie or series) appears on a different outlet, costs are incurred to ensure the captioning has not been lost or thrown out of synch as a result of the normal editing process. Even at the low end of $350 per hour,[18] reformatting is an expensive as well as a time consuming process.

There are other operational realities that can make captioning technically difficult. For example, pre-recorded programming may be delivered virtually hours before airing. The delivery schedule for such product would make it impossible to send the program out to be captioned <u>and</u> air it at the scheduled time. Again, this can be the case even for made-for-cable

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17 NPRM at ¶22.

18 <u>See</u> <u>Captioning Report</u> at ¶49.

programming that comes in a captioned format. Any editing performed by the network prior to airing can throw the captions off and require the program to be reformatted. This reformatting entails sending the tape off-site, which requires a lead time of many weeks.

Cable networks also air a variety of foreign-produced programs. Even if captioned by the foreign producer, the captioning may not be consistent with United States captioning standards, and therefore cannot be used. Cable programmers also present a variety of video fare not ordinarily shown on over-the-air television, such as independent films that are not Hollywood-produced. Captioning may not be routinely incorporated into these independent productions before their initial exhibition, as would be the case with other motion pictures. Imposing a captioning requirement would significantly change the economics of this program production.

Logistical difficulties can also make captioning unscripted, live programs a challenge. A stenocaptioner is required to caption these programs. There is currently a shortage of these highly trained personnel. Furthermore, the economics of live programming differ from pre-recorded fare. The costs of captioning live programming cannot be spread out over multiple airings. Live programming is perishable -- and while it might be re-aired within a relatively short time period, it has a limited shelf life.

In short, the variety of programming presented on cable presents unique challenges to attaining a significantly higher degree of captioning across-the-board. Many networks are inexperienced in the captioning area, and lack relationships with established captioning agencies. They also have not developed sponsorship relationships with advertisers and have not been the recipients of government grants. Further, they lack in-house captioning staff or equipment that will enable them to caption in a cost-effective manner. And they present many hours of new and old programming each day that is not currently captioned.

For all these reasons, the Commission must adopt realistic time frames for implementation of its new captioning requirements that appropriately take into account the challenges faced by the diverse cable programming universe.

III. THE COMMISSION SHOULD ADOPT A REASONABLE TIMETABLE FOR COMPLIANCE WITH CLOSED CAPTIONING REQUIREMENTS FOR NON-EXEMPT NEW PROGRAMMING

A reasonable transition is critical to ensure that the significant costs and resources required to accomplish additional captioning are not abruptly imposed on program producers, program networks, cable operators, or their customers.

Congress granted the Commission ample authority to ensure that any new requirements are not "economically burdensome." To that end, the rules must provide a reasonable phase-in period and incorporate appropriate exemptions. Otherwise, the Commission will be inundated with individual petitions requesting a determination that the costs of captioning constitute an "undue burden." Relegating most decisions to "undue burden" hearings will strain Commission resources and will lead to lengthy delays that will interfere with the creative process.

A. The Commission Should Allow A Phase-In Of Captioning Requirements For New, Non-Exempt Programming

We agree with the Commission's tentative conclusion that "we do not believe that it is practical to mandate immediate captioning of all non-exempt video programming."[19] The Notice recognizes that:

> [c]ertain limitations exist, such as the number of available captioners and captioning services, the costs of captioning, and the effect that immediate implementation of mandatory captioning rules might have on the continued availability of certain types of video programming. In addition, given the plain language of the statute, appropriate exemptions, undue burden arguments and pre-

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19 Id. at ¶40.

existing contract considerations must be taken into account in crafting any rules that establish a deadline by which new programming must be captioned.[20]

Accordingly, the Notice seeks comment on whether the FCC should adopt an eight year transition for non-exempt programming, with 25% of non-exempt new programming required to be captioned every two years.[21] Alternatively, the Commission seeks comment on a ten year transition schedule, with 25% after three years, 50% after 5 years, 75% after seven years, and 100% after ten years.

Given the challenges faced by many cable networks in attaining a significantly higher degree of captioning, a 10 year transition for new, non-exempt programming is warranted. We also urge the Commission to craft a de minimis exception from achieving full captioning of all new non-exempt programming at the conclusion of the transition, in order to avoid imposing significant burdens on program networks.

1. The Commission Should Provide A Ten Year Transition

A ten year transition for new, non-exempt programming is warranted for several reasons. First, as NCTA's NOI Comments point out, the cable industry has significantly increased its captioning efforts over the last several years. Many cable networks already provide well in excess of 25 percent of their new programming in a captioned format.[22] But much remains to be

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20 Id.

21 Id. at ¶41.

22 The Notice proposes to require providers that receive captioned material, and which do not edit the material, to transmit the programming intact, regardless of whether it has already met the benchmark. Notice at ¶47. But with respect to networks that edit this material, and hence would need to reformat it, the Notice seeks comment on whether a different approach would be warranted.

Reformatting, as described above, is an expensive process -- even if it may cost less than captioning an original pre-recorded program. For this reason, the Commission should not done to achieve the significantly higher level of captioning across-the-board for many other networks that will be mandated under the FCC's rules.

Few cable networks have in-house captioning staffs or captioning equipment. And while nearly 30 cable networks have arrangements for closed captioning with the Caption Center and National Captioning Institute,[23] they represent less than a quarter of the national cable network universe. Furthermore, the vast majority of government funding that has enabled programmers to provide closed captioning has historically been directed to the broadcast, rather than the cable, networks.[24] Cable program networks need additional time to forge partnerships and obtain sponsorships, if possible, to assist in their captioning efforts. Many cable networks simply have not had the experience needed to achieve a significantly higher degree of captioning in a relatively short period of time.

Other practical problems also counsel in favor of a longer transition period. The program budgets for 1997 (and in some cases for 1998) have already been set, and funds necessary to accomplish additional program captioning cannot be incorporated into those budgets. A network therefore loses at least a year before it can begin its efforts to meet new requirements.

Finally, as the Commission's Notice recognizes, there currently is a shortage of captioning facilities (and stenocaptioners for live programming) necessary to accommodate the significant increase in demand that will follow from the rules. It is likely that demand may well

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differentiate between reformatting and other captioning efforts in measuring compliance with different captioning thresholds.

23 NCTA Comments at 5.

24 Id. at 6.

exceed supply in the initial stages of imposition of mandatory captioning requirements. It will take time to develop alternative captioning resources, such as in-house captioning. It will also take time for new captioning outlets to grow and to respond to a much wider array and increased demand of potential customers.

For all these reasons, we urge the Commission to provide a 10 year transition period. The additional 2 years will provide time for cable networks to "ramp up" their captioning efforts, and will allow them to absorb the economic and marketplace demands of captioning on a reasonable timetable, thereby avoiding undue economic burdens.

2. The Commission Should Not Require Captioning of All New, Non-Exempt Programming at the End of the Transition Period

Congress did not intend the costs of captioning to interfere with the creative process or stifle program development or network growth. While Congress directed the Commission to ensure "full accessibility" of programming first published or exhibited after the rule's effective date, it also recognized that a case-by-case showing could be used to relieve captioning obligations with respect to particular programs. In order to ensure that captioning requirements do not impede program creation, we urge the Commission not to require that all new programs be captioned at the end of the transition period. Instead, the Commission should allow programmers flexibility and discretion to determine those unusual cases where captioning cannot be feasibly accomplished by crafting a de minimis exemption from full accessibility of all new non-exempt programs.

Several ill effects would flow if 100 percent captioning were required unless a new program fell into a defined exempt category. Most significantly, the need for captioning would dictate whether or not a program is even aired. For example, it is not unusual for a program to be received or created shortly before its scheduled presentation. It may be impossible to caption it under these circumstances.[25] But it would be equally impossible for a cable network in an expeditious time frame to seek and obtain an FCC ruling that captioning constitutes an "undue burden", thereby relieving it of its captioning obligation. It is hardly likely that prosecuting a petition at the FCC will be feasible for a particular program, given the costs and the time constraints involved. It is much more likely that the program simply will not be shown.

It is impossible to anticipate in advance all conceivable scenarios in which captioning would impose an economic burden, particularly given the newness of the requirement with respect to cable networks. Rather than cast exemptions in stone, and relegate all other situations to costly and time consuming "undue burden" showings, the Commission should permit networks to achieve a maximum benchmark of less than 100% (such as 90%) for all new, non-exempt programming at the end of the transition period.[26] This de minimis exception should greatly enhance the smooth operation of the administrative and enforcement aspects of closed captioning while giving cable networks the flexibility to show programs that otherwise might not be possible to air.

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25 It takes as long as 20 or 30 hours to caption a one hour program. Captioning Report at ¶47.

26 The Commission has recognized the appropriateness of a "substantial compliance" approach in other situations. For example, Section 73.315(a) of the Commission's Rules requires that commercial FM transmitters be sufficiently located to provide a signal over the entire principal community to be served. However, the FCC does not require waiver of this requirement unless the proposed coverage falls below 80% of the area of the principal community. See In re Applications of Radio Representatives, Inc., 7 FCC Rcd. 6052 (Rev. Bd. 1992), In re Applications of Susan Lundborg, 2 FCC Rcd. 3895 (Hrg. Bd. 1987) and In re Applications of A.B.C.D. Broadcasting Company, 2 FCC Rcd. 6551 (Audio Serv. 1987).

B. The Commission Should Measure Compliance On A Network By Network Basis

The Notice tentatively proposes to "apply the percentage of programming that must be captioned on a system-wide basis."[27] The Notice suggests that this approach "would make possible a more rational, market driven allocation of captioning resources during the transition process."[28] The Notice alternatively seeks comments on whether the percentages of programming that must be captioned should apply to each program service or channel retransmitted by the multichannel video programmer.[29]

The Commission should not measure compliance across a cable system. While doing so might give certain program networks a longer phase-in to achieve captioning requirements, it presents difficult, if not impossible, administrative problems in determining, for a particular network or system, whether compliance has been achieved.

Imposing the requirement across a system would lead to very serious practical problems. It could force 11,000 cable systems to obtain captioning resources in order for operators to themselves caption programming that they have not produced. This clearly would be a cost-prohibitive way to obtain captioning; cable systems could not caption unless they had access to copies of all the programming in advance of airing. Moreover, the Commission acknowledges that it is most efficient to caption at the production stage. Forcing operators at the distribution phase to caption programming would be the most inefficient means of accomplishing the same result. From a network perspective, the amount of captioning that any one network would be

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27 NPRM at ¶43.

28 Id.

29 Id.

required to achieve would depend on the amount of captioning that all other networks would be providing to the system. This uncertainty would make planning and budgeting for closed captioning a difficult, if not impossible, process.

A system-based requirement raises numerous other difficult questions. A typical cable system carries 53 channels of programming. Assuming each channel airs 23 hours of programming daily, an operator would be responsible for monitoring nearly 450,00 hours of programming annually in order to determine whether it would be in compliance with the captioning rules. How would an operator know in advance the program schedules of all the networks that it carried and the amount of captioned material that they intended to present? Would an operator be forced to drop a particular network (or not add another network) because carrying it otherwise would cause it not to meet its overall captioning benchmark? Could an operator insist that one network be fully captioned to compensate for one that has a minimal amount of captioning? Given the exemptions incorporated into the rules, would an operator know if all program networks had met their requisite captioning commitments so that action could be taken to avoid running afoul of the rules?

While this system measurement approach presents a problem for all operators and networks, it particularly stings smaller systems. This approach would require an entirely new mechanism that does not exist today to keep track of programming. Small systems have neither the personnel nor the resources that would be required to engage in the detailed tracking that would appear necessary to determine whether the networks they carry comply with the captioning rules.[30]

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[30] The Regulatory Flexibility Act of 1980 requires the Commission to assess the impact of its rules on small systems and to consider alternatives that minimize the burdens on such

To streamline the new captioning requirements, NCTA urges that the Commission apply the requirements on a network-by-network basis. This way, each network can judge whether it reached the appropriate captioning thresholds for its new programming, without factoring in the efforts of other program networks. Each network would be able to set budgets and hire staff based on established benchmarks for its own programming. And each operator would be able to continue to carry the programming that its customers desire without having to engage in the difficult balancing act a system-wide measurement requires.[31]

C. Compliance Efforts Should Be Measured On A Reasonable Schedule

The Notice asks what time frame to use to measure whether the compliance benchmarks have been achieved.[32] The Commission recognizes that there might be "legitimate reasons why certain weeks might have less captioning than others."[33] This observation is certainly the case with cable networks, and it warrants a longer measurement period than that proposed in the Notice.

Cable networks typically have more flexible scheduling than traditional over-the-air networks. A cable news network may carry live, breaking news for a significant period of time,

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entities. See 5 U.S.C. §§607-612. The network-by-network approach suggested above is an alternative that is less administratively and economically burdensome than the proposal to measure captioning across a cable system.

31 While compliance should be measured on a network-by-network basis, NCTA agrees with the Notice's proposal that a "video programming provider" -- i.e., cable operator -- would be responsible for compliance. However, an operator should not be responsible for compliance by PEG and leased access programmers, or broadcast stations. See Section VIII, infra.

32 Id. at ¶45.

33 Id.

rather than its regularly scheduled programming. Other networks may cover live events (such as concerts or sports) that are not part of their regularly scheduled line-up, or they may carry types of programming that may predominate only during a relatively short period of time (such as a sports season). Yet others offer themed program weeks (or even months). In order to ensure that the captioning rules accurately capture a network's over-all efforts, rather than reflect merely a non-representative week, the Commission should measure compliance with the transition benchmarks on an annual, calendar year basis.

This annual approach more closely dovetails with the Commission's transition benchmarks than would a more frequent system of measurement. Under the phase-in proposed in the Notice, a network would not be required to achieve a prescribed percentage of captioned new material until the end of a particular year. Using a snapshot of one week out of that year would not provide the Commission with information about whether the benchmark was reached over the appropriate period.

IV. THE COMMISSION SHOULD ADOPT REASONABLE EXEMPTIONS FOR NEW PROGRAMMING

As described in detail above, Congress directed the Commission to establish "programs, classes of programs, or services for which the Commission has determined that the provision of closed captioning would be economically burdensome to the provider or owner of such programming."[34] Congress granted the FCC broad authority to fashion exemptions, but also allow individualized "undue burden" showings for providers for which captioning presents significant difficulty or expense.

[34] Section 713(d).

While "undue burden" showings remain an important safeguard in particularized situations, the Commission should adopt broad exemptions where the costs or difficulties of captioning are experienced virtually across the board. In so doing, the Commission will avoid imposing burdens on the networks that can least afford to come forward to prosecute an undue burden application. The Commission will also enable more funds to be directed toward programming efforts and less toward administrative filings.

The Notice seeks comment on "whether a definition of economic burden should be based on factors such as relative market size, degree of distribution, audience ratings or share, relative programming budgets or revenue base, lack of repeat value, or a combination of factors."[35] All these factors are relevant to a showing of economic burden. While many cable networks are carried nationwide, the relative reach and viewership of even some of the most widely available cable networks do not come close to the over-the-air networks. Over-the-air networks are available in virtually every television home. Cable networks reach at most 71% of those homes, including all methods of distribution (DBS, MMDS, SMATV, and cable.) In the fourth quarter of 1996 ABC, NBC and CBS taken together had a prime-time average rating of 10.1, which translates into 9.8 million homes. The average cable rating (for the 35 Nielsen-metered basic cable networks) during that same period was .5 or 454,000 homes actually watching during an average minute of prime-time programming. Thus, cable networks as a rule would be disproportionately affected by any new mandatory captioning requirements.

Moreover, the cable program universe is extremely diverse. Individual program network commenters will provide information to the Commission regarding their circumstances that

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35 Notice at ¶71.

warrant exemptions for particular programs or certain types of services. We detail below certain broad categories of programs for which exemptions are warranted across-the-board for all cable program networks based on the economic burden they each would face.

A. The Commission Should Exempt Start-Up Networks

Program diversity has exploded since the advent of cable television networks in the mid-1970s. There are now over 165 national networks and nearly 50 regional networks. In just one year, 44 cable networks have announced plans to begin offering service.[36]

The costs of starting a network are high. Indeed, the start-up costs of launching a stand-alone cable network have been estimated at $100 million .[37] Start-up networks, even for established participants in the programming marketplace, are in most cases not profitable for many years. In general, it takes at least 5 years after launch for a new network to gain acceptance in the marketplace and to reach the breakeven point.[38] It will be many more years after achieving the breakeven point before a new network can attract sufficient advertising or subscriber revenues to recoup the initial investment in the service.[39] And, unfortunately, a number of new cable networks either fold within the first 5 years of launch due to the competitive nature of the marketplace or never become profitable.

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36 1996 Competition Report at ¶148 (comparison between 1995 and 1996 Competition Reports).

37 Comments of the A&E Networks, MM Docket No. 95-176 at 20 (filed Mar. 15, 1996).

38 See, e.g., Cable TV Programming, Apr. 30, 1995 at 2 (describing how network's owners expected 5 years before achieving operating breakeven); "MSNBC Signs Major MSOs. Readies Launch"; Cable TV Programming, June 30, 1996 at 2 (5 years before breakeven; 10 years post-launch to recoup start-up costs and operating losses).

39 Id. at 3 (9 years before initial investment recouped).

Imposing a captioning requirement at the outset could well mean the difference between success or failure of a new network. To avoid stifling development of diverse and new programming sources, an exemption from captioning requirements for new networks is clearly warranted. The Commission should exempt start-up networks from captioning requirements for at least five years from launch. The Commission also should consider whether to relieve networks with a limited subscriber base from captioning requirements, even after five years. In this difficult environment for new services, it may take even longer than projected to break even.

Once the minimum start-up period has passed, a start-up network should have the same amount of time to phase-in captioning of new programming. In other words, a start-up network should have a 10-year transition that would commence from the time its start-up status ends under the rules.

B. The Commission Should Exempt The Overnight Daypart From Mandatory Captioning Requirements

The cost of captioning relative to the audience is clearly a factor that Congress intended the Commission to consider in crafting exemptions.[40] This analysis leads to the conclusion that captioning should not be mandatory during the time of day when viewership is the lowest -- during the "overnight" period from 2:00 am to 6:00 am. This is the least-viewed daypart for all television homes.[41] Nearly a quarter of all basic cable networks rated by Nielsen do not reach the minimum viewing threshold to achieve a rating for that period. And for the basic networks that

40 House Report at 115.

41 According to Nielsen Media Research, 8 percent of television usage occurs between the hours of 1:00 am to 6:00 am. This compares with 25 percent during prime time. Broadcasting & Cable Yearbook 1996 at C-245.

are rated, they reach roughly one third of their prime time households,[42] which is, on average, less than 100,000 viewers during the overnight period.

Program networks schedule a variety of lower-budgeted productions during these early morning hours. These programs are not expected to be viewed by a large audience and license fees paid for these programs reflect this expectation. Other networks primarily air infomercials, rather than half-hour or hour programs or movies, during this period.

To the extent that networks re-air programs previously shown during the higher-viewed dayparts, captioned material already will be available overnight. Mandating captioning during this time period will only result in certain titles not being shown at all. Additionally, resources devoted to captioning would be siphoned away from captioning more popular programs in order to serve an extremely small potential audience.

For all these reasons, the Commission should exempt the overnight day part from any mandatory captioning requirement.

C. Interstitial/Promotional Programming Should Be Exempt

Networks create significant amounts of "interstitial" programming on a daily basis. This material includes promotions for upcoming programs that are typically placed in-between shows, station identifications, bumpers that consist mostly of music, and wraps. The interstitial materials may be cut and re-cut several times with various editing and often with various lengths, and invariably have a short shelf-life.

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[42] Based on comparison of Cable Coverage Area Ratings - October 2, 1995 - September 29, 1996 and Economics of Basic Cable Networks, Paul Kagan Associates (1996) at 32.

The Notice correctly concludes that "most interstitials and promotional advertisements provide their principal information in textual form. Thus, given the number of such announcements and the short time period in which they are produced, we tentatively conclude that the burden of requiring captioning of interstitials and promotional advertisements outweighs the benefit of a mandatory requirement for captioning, and thus interstitials and promotional advertising would be included in our general exemptions."[43] We agree that this material should be exempt from any captioning requirement.

Captioning interstitial programming presents insurmountable practical problems. Networks have neither the personnel nor adequate lead time to caption these materials. This type of promotional programming typically is produced in-house using computers. In order to fully caption interstitials, each network would be required to hire and train in-house captioning personnel. Each network also would be forced to acquire additional captioning equipment and to obtain the technical ability to encode captions on the interstitial programming. Even then, the short time between the creation and airing of interstitials, and the extensive editing and recutting of interstitials within such a short time frame, may make captioning impossible.

In any event, much of the video in interstitials contains graphics and other information that enable viewers to understand the information conveyed. For example, many interstitials contain information about up-coming programs and time and day information on screen that is conveyed by the audio accompanying the promotional material.

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43 Notice at ¶79.